

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARK FREGIA,

Plaintiff,

v.

MIRANDA, *et al.*,

Defendants.

Case No. 1:21-cv-01068-JLT-BAM (PC)

FINDINGS AND RECOMMENDATIONS
GRANTING DEFENDANT SAVAGE'S
MOTION FOR SUMMARY JUDGMENT

(ECF No. 75)

FOURTEEN (14) DAY DEADLINE

I. Introduction

Plaintiff Mark Fregia ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds against Defendants Ridge and Savage based on Plaintiff's claims that Defendants were deliberately indifferent to Plaintiff's serious medical needs by continuing to prescribe medications that caused him to suffer lichen planus, and then failed to treat such skin condition.

Currently before the Court is Defendant Savage's motion for summary judgment¹ on the grounds that Defendant Savage ("Defendant") was not deliberately indifferent to Plaintiff's medical needs under the Eighth Amendment, Defendant is entitled to qualified immunity, and Plaintiff failed to exhaust his administrative remedies prior to filing his lawsuit against

¹ Defendant Ridge filed a separate motion for summary judgment, (ECF No. 81), which will be addressed by separate findings and recommendations.

1 Defendant. (ECF No. 75.)² Following an extension of time, Plaintiff filed an opposition to the
 2 motion for summary judgment on September 16, 2022. (ECF No. 82.) Defendant filed a reply on
 3 September 30, 2022. (ECF No. 85.) Defendant Savage's motion for summary judgment is fully
 4 briefed. Local Rule 230(l). For the reasons set forth below, the Court recommends that
 5 Defendant's motion for summary judgment be granted.³

6 **II. Legal Standard**

7 Summary judgment is appropriate when the pleadings, disclosure materials, discovery,
 8 and any affidavits provided establish that "there is no genuine dispute as to any material fact and
 9 the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is
 10 one that may affect the outcome of the case under the applicable law. *See Anderson v. Liberty*
 11 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a
 12 reasonable [trier of fact] could return a verdict for the nonmoving party." *Id.*

13 The party seeking summary judgment "always bears the initial responsibility of informing
 14 the district court of the basis for its motion, and identifying those portions of the pleadings,
 15 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
 16 which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v.*
 17 *Catrett*, 477 U.S. 317, 323 (1986). The exact nature of this responsibility, however, varies
 18 depending on whether the issue on which summary judgment is sought is one in which the
 19 movant or the nonmoving party carries the ultimate burden of proof. *See Soremekun v. Thrifty*
 20 *Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). If the movant will have the burden of proof at
 21 trial, it must "affirmatively demonstrate that no reasonable trier of fact could find other than for
 22 the moving party." *Id.* (citing *Celotex*, 477 U.S. at 323). In contrast, if the nonmoving party will
 23 have the burden of proof at trial, "the movant can prevail merely by pointing out that there is an
 24 absence of evidence to support the nonmoving party's case." *Id.*

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 26 ² Concurrent with the motion, Plaintiff was provided with notice of the requirements for opposing a motion for
 27 summary judgment. (ECF No. 75-3.); *see Woods v. Carey*, 684 F.3d 934 (9th Cir. 2012); *Rand v. Rowland*, 154 F.3d
 952, 957 (9th Cir. 1988); *Klingele v. Eikenberry*, 849 F.2d 409, 411–12 (9th Cir. 1988).

28 ³ This motion was dropped inadvertently by the Court's CM/ECF reporting/calendaring system resulting in the
 prolonged delay in resolution.

If the movant satisfies its initial burden, the nonmoving party must go beyond the allegations in its pleadings to “show a genuine issue of material fact by presenting affirmative evidence from which a jury could find in [its] favor.” *F.T.C. v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) (emphasis omitted). “[B]ald assertions or a mere scintilla of evidence” will not suffice in this regard. *Id.* at 929; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (“When the moving party has carried its burden under Rule 56[], its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.”) (citation omitted). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587 (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

In resolving a summary judgment motion, “the court does not make credibility determinations or weigh conflicting evidence.” *Soremekun*, 509 F.3d at 984. Instead, “[t]he evidence of the [nonmoving party] is to be believed, and all justifiable inferences are to be drawn in [its] favor.” *Anderson*, 477 U.S. at 255. Inferences, however, are not drawn out of the air; the nonmoving party must produce a factual predicate from which the inference may reasonably be drawn. *See Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244–45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987).

In arriving at these findings and recommendations, the Court carefully reviewed and considered all arguments, points and authorities, declarations, exhibits, statements of undisputed facts and responses thereto, if any, objections, and other papers filed by the parties. Omission of reference to an argument, document, paper, or objection is not to be construed to the effect that this Court did not consider the argument, document, paper, or objection. This Court thoroughly reviewed and considered the evidence it deemed admissible, material, and appropriate.

III. Discussion

A. Evidentiary Objections

Plaintiff asserts an “ongoing objection” to Defendant’s evidence, arguing that certain “supposed quotes” by Plaintiff or Defendant are not based on testimony or materials entered into evidence. (ECF No. 82, p. 2.) Plaintiff also appears to question the credibility of Defendant’s

1 evidence generally, and provides his own arguments and factual allegations in opposition.

2 Plaintiff's evidentiary objections are overruled. Plaintiff must do more than attack the
3 credibility of Defendant's evidence. *See National Union Fire. Ins. Co. v. Argonaut Ins. Co.*, 701
4 F.2d 95, 97 (9th Cir. 1983) ("[N]either a desire to cross-examine an affiant nor an unspecified
5 hope of undermining his or her credibility suffices to avert . . . judgment."). Further, Federal Rule
6 of Civil Procedure 56(c)(1) specifically requires that a party asserting that is genuinely disputed
7 must support the assertion by "citing to particular parts of materials in the record . . . or showing
8 that the materials cited do not establish the absence or presence of a genuine dispute, or that an
9 adverse party cannot produce admissible evidence to support the fact." Similarly, pursuant to
10 Local Rule 260(b), a party opposing a motion for summary judgment is required to deny those
11 facts that are disputed, "including with each denial a citation to the particular portions of any
12 pleading, affidavit, deposition, interrogatory answer, admission, or other document relied upon in
13 support of that denial." To the extent Plaintiff has identified that a fact is in dispute but fails to
14 provide supporting evidence or otherwise demonstrate that the evidence relied upon by Defendant
15 is inadmissible, such fact will be accepted as undisputed.

16 **B. Undisputed Material Facts ("UMF")⁴**

17 Background Concerning the Parties

18 1. Plaintiff has been incarcerated in the custody of the California Department of
19 Corrections and Rehabilitation ("CDCR") since 2008, and was housed at Sierra Conservation
20 Center ("SCC") from 2014 to 2017. (ECF No. 1 ("Compl."), pp. 4, 9; Ex. GG ("Pl.'s Depo.") at
21 24:23–25:3.)

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24 ⁴ See Separate Statement of Undisputed Facts in Support of Defendant Dr. W. Savage's Motion for Summary
25 Judgment. (ECF No. 75-2.) Plaintiff did not comply with the rules in preparing his opposition, including by failing
26 to reproduce Defendant's Statement of Undisputed Facts and providing "a citation to the particular portions of any
pleading, affidavit, deposition, interrogatory answer, admission, or other document relied upon in support" of any
27 disputed facts, or providing a statement of disputed facts. Local Rule 260(b). As a result, Defendant's Statement of
28 Undisputed Facts is accepted except where brought into dispute by Plaintiff's verified complaint, signed under
penalty of perjury. *See Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004) (verified complaint may be used as an
opposing affidavit if it is based on pleader's personal knowledge of specific facts which are admissible in evidence).
Unless otherwise indicated, disputed and immaterial facts are omitted from this statement and relevant objections are
overruled.

1 2. Defendant has been licensed to practice medicine in California since 1998. He
2 was employed as a staff physician at SCC from 2006 until 2020 when he retired from medical
3 practice. (Ex. BB (“Savage Decl.”), ¶¶ 2–3.)

4 3. As a staff physician at SCC, defendant provided primary medical care to inmates,
5 which included conducting physical examinations, providing necessary treatment, prescribing
6 medication, interpreting test results, and providing educational and preventative information. (*Id.*
7 ¶ 4.)

8 Plaintiff’s Medical Care from 2014 to 2017

9 4. On February 6, 2014, Plaintiff was seen at SCC by L. Schmidt, FNP-C. It was
10 noted that Plaintiff had been off insulin for four months, as he was trying to lose weight. Plaintiff
11 now wanted to restart metformin (a medication used to control high blood sugar) and insulin for
12 his type 2 diabetes. The physical examination showed that Plaintiff had a BMI (Body Mass
13 Index) of 34, which meant that Plaintiff was in the obese category. It was also noted that Plaintiff
14 had no rashes on his skin at the time. Nurse Practitioner (“NP”) Schmidt ordered new labs and a
15 CMP (comprehensive metabolic panel) for Plaintiff, and ordered that he return to the medical line
16 on February 7, 2014. (Ex. A, Progress Note; Savage Decl., ¶ 7.)

17 5. On February 7, 2014, Plaintiff was seen by NP Schmidt who noted that Plaintiff
18 had restarted Lantus (insulin injections for type 2 diabetes). NP Schmidt also noted that the
19 metformin prescription was on hold, as the results from the lab work that had been ordered were
20 pending. (Ex. B, Progress Note; Savage Decl., ¶ 8.)

21 6. On February 14, 2014, Plaintiff was seen by NP Schmidt who ordered that
22 Plaintiff restart metformin. Plaintiff was also to continue receiving Lantus injections. (Ex. C,
23 Progress Note; Savage Decl., ¶ 9.)

24 7. On February 28, 2014, Plaintiff was restarted on metformin 500 mg. On the same
25 day, NP Schmidt also started Plaintiff on hydrochlorothiazide 25 mg (a diuretic used to treat high
26 blood pressure). (Ex. D, Medication Reconciliation Record; Savage Decl., ¶ 10; Pl.’s Depo. at
27 61:21–62:15.)

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1 8. On March 12, 2014, Defendant saw Plaintiff at the SCC clinic related to Plaintiff's
2 recent transfer to the facility. The physical examination revealed that Plaintiff had seborrheic
3 dermatitis (a common skin disease that causes an itchy rash and flaky scales also known as
4 dandruff) on his face. In order to treat the seborrheic dermatitis, Defendant prescribed selenium
5 sulfide 2.5% suspension lotion (a medication used to help control the symptoms of dandruff and
6 seborrheic dermatitis) and clotrimazole 1% cream (an antifungal medicine). In order to manage
7 and monitor Plaintiff's diabetes, Defendant ordered lab work and an optometry referral.
8 Defendant also ordered that Plaintiff return to the clinic in 3–4 months. (Ex. E, Progress Note;
9 Ex. F, Physician's Orders; Ex. G, Medication Administration Record; Savage Decl., ¶ 11.)

10 9. On April 30, 2014, Plaintiff had the blood work done that Defendant had ordered.
11 (Ex. H, Lab Report; Savage Decl., ¶ 12.)

12 10. On July 1, 2014, Defendant renewed Plaintiff's hydrochlorothiazide prescription
13 for the treatment of Plaintiff's blood pressure. (Ex. I, Medication Reconciliation Record; Savage
14 Decl., ¶ 13.)

15 11. When Defendant renewed Plaintiff's hydrochlorothiazide prescription (which had
16 originally been ordered by NP Schmidt), there was no indication that Plaintiff was experiencing
17 any adverse side effects (such as a skin condition) from this blood pressure medication at the
18 time. Because Plaintiff was diabetic and obese, it was also medically important that his blood
19 pressure be controlled. (Savage Decl., ¶ 13.)

20 12. On July 7, 2014, Defendant saw Plaintiff for a follow-up. Plaintiff's chief
21 complaint was left head pain. Defendant noted that Plaintiff was experiencing no hypertension
22 but he was still having issues with obesity. In particular, Plaintiff's BMI had increased to 37.5.
23 Plaintiff did not complain about any skin conditions at the time Defendant saw him. Defendant
24 ordered lab work and that Plaintiff return to the clinic in 3–4 months. (Ex. J, Progress Note;
25 Savage Decl., ¶ 14.)

26 13. On September 12, 2014, Plaintiff had the blood work done that Defendant had
27 ordered. (Ex. K, Lab Report; Savage Decl., ¶ 15.)

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1 14. On October 30, 2014, Plaintiff was scheduled to see Defendant for a follow-up.
2 However, Plaintiff refused to be seen. (Ex. L, Progress Note; Savage Decl., ¶ 16.)

3 15. On January 9, 2015, Plaintiff had the blood work done that Defendant had ordered.
4 (Ex. M, Lab Report; Savage Decl., ¶ 17.)

5 16. On January 15, 2015, Defendant submitted a request for a referral to optometry for
6 Plaintiff to have his annual screening for diabetic retinopathy (an eye condition that can cause
7 vision loss and blindness in people who have diabetes). (Ex. N, Physician Request for Services;
8 Savage Decl., ¶ 18.)

9 17. On February 9, 2015, Defendant saw Plaintiff for a follow-up related to a CDCR
10 7362 form that Plaintiff had submitted and with regard to Plaintiff's earlier refusal to be seen.
11 During the appointment, Plaintiff indicated that he was "great." Plaintiff's blood pressure was
12 slightly high (138/86) and his BMI was 36.9. Plaintiff stated that he had not taken his medication
13 in the morning but indicated that he would do so. Defendant checked Plaintiff's blood work
14 results and ordered a follow-up in 3–4 months. (Ex. O, Progress Note; Savage Decl., ¶ 19.)

15 18. On March 26, 2015, Defendant saw Plaintiff for a review of Plaintiff's
16 monofilament test (a test to check for nerve damage which may be caused by conditions such as
17 diabetes). Defendant noted that in his last visit, Plaintiff had asked that his insulin prescription be
18 discontinued. During this visit, Plaintiff asked for more metformin. (Ex. P, Progress Note;
19 Savage Decl., ¶ 20.)

20 19. On May 22, 2015, Plaintiff had the blood work done that Defendant had ordered.
21 After this, Defendant did not see Plaintiff in 2015 or later in 2016. (Ex. Q, Lab Report; Savage
22 Decl., ¶¶ 21, 23; Pl.'s Depo at 85:25–86:16.)

23 20. On June 22, 2015, Plaintiff's hydrochlorothiazide 25 mg prescription was renewed
24 by Defendant Dr. N. Ridge. Plaintiff's metformin prescription was also increased from 500 mg to
25 1,000 mg. (Ex. R, Medication Reconciliation Record; Savage Decl., ¶ 22.)

26 21. On December 14, 2016, Plaintiff submitted a CDCR 7362 form requesting a refill
27 of his selenium sulfide prescription. A refill was ordered for Plaintiff on December 16, 2016.
28 (Ex. S, Health Care Services Request; Savage Decl., ¶ 24.)

1 22. On January 18, 2017, Plaintiff had a dermatology consultation with Dr. R. Hrabko
2 about Plaintiff's skin conditions. During the appointment, Plaintiff indicated that the thing that
3 was bothering him the most was the rash on his face. He stated that he had been using selenium
4 sulfide shampoo which seemed to help but had not cleared the condition. Plaintiff also indicated
5 that he recently discontinued his metformin and hydrochlorothiazide prescriptions which he
6 thought improved his lichen planus a bit. The physical examination revealed some redness in the
7 paranasal region but the beard area was hard to evaluate. Multiple red papules (raised spots on
8 the skin) were visible on the lower extremities. Dr. Hrabko's impression was that Plaintiff had
9 seborrheic dermatitis on his face and lichen planus. (Ex. T, Dermatology Report; Savage Decl.,
10 ¶ 25.)

11 23. Dr. Hrabko ordered that Plaintiff start using ketoconazole 2% shampoo (containing
12 an antifungal medicine) in the beard area and discontinue using the selenium sulfide shampoo.
13 Dr. Hrabko noted that if any lesions appeared on the nose (which he did not actually see at that
14 time), then Plaintiff might also need ketoconazole cream. Dr. Hrabko also prescribed
15 Metronidazole 500 mg for 60 days, as there had been a report that the medications clears
16 significant number of lichen planus patients. (*Id.*)

17 24. In his report, Dr. Hrabko noted that the lichen planus may or may not be drug-
18 induced. (*Id.*)

19 25. On February 1, 2017, Plaintiff had a follow-up with Defendant Ridge. During the
20 appointment, Plaintiff indicated that he had started the ketoconazole shampoo in his beard that
21 had been recommended by the dermatologist. However, Plaintiff stated that he did better with
22 selenium sulfide in the past with regard to pain from the rash. Defendant Ridge noted that
23 Plaintiff's blood sugar levels had been elevated in the past 1–2 weeks, likely contributed to by the
24 discontinuation of metformin which was used to treat his diabetes. Defendant Ridge discussed
25 this concern with Plaintiff, who stated that he would do better at dieting and exercising to lose
26 weight. Defendant Ridge noted that this was a key component in the treatment of diabetes,
27 especially in patients who are obese like Plaintiff. Defendant Ridge also noted that Plaintiff's
28 blood pressure had been slightly elevated, likely due to the discontinuation of his

1 hydrochlorothiazide prescription. (Ex. U, Progress Note; Savage Decl., ¶ 26.)

2 26. On the same day, Plaintiff received patient education materials about seborrheic
3 dermatitis and lichen planus. (Ex. V, Discharge Instructions; Savage Decl., ¶ 27.)

4 27. On February 24, 2017, Plaintiff had a dermatology follow-up with Dr. Hrabko.
5 The physical examination revealed that Plaintiff's face was relatively clear. Because there were
6 some lesions on Plaintiff's right leg, Dr. Hrabko also prescribed clobetasol ointment 0.05% (a
7 corticosteroid used to treat various skin conditions) for Plaintiff to use q.h.s. (i.e. every night at
8 bedtime). (Ex. W, Dermatology Report; Savage Decl. ¶ 28.)

9 28. In his report, Dr. Hrabko noted that it was not clear whether or not the lichen
10 planus was secondary to metformin and/or hydrochlorothiazide. (*Id.*)

11 29. On or about April 6, 2017, Plaintiff submitted a CDCR 602 inmate appeal (SCC
12 HC 17012631) in which he stated that a dermatologist had recommended something stronger for
13 his lichen planus infection but a SCC doctor had discontinued it due to Plaintiff's prior lawsuits
14 against SCC medical staff. Plaintiff requested that he be given the medication that had been
15 recommended by the dermatologist. Plaintiff also requested that photos be taken of his condition.
16 Further, Plaintiff requested to be taken off the caseload of Defendant Ridge due to a conflict of
17 interest. Plaintiff also requested that he not be retaliated against. (Ex. X, Inmate 602 Appeal
18 Documents; Savage Decl., ¶ 29; Ex. CC ("Abernathy Decl."), ¶ 9.)

19 30. Defendant was assigned to interview Plaintiff about the matters raised in Plaintiff's
20 inmate appeal at the first level. (Savage Decl., ¶ 30; Pl.'s Depo. at 89:13–90:22.)

21 31. On April 24, 2017, Defendant attempted to interview Plaintiff about his inmate
22 appeal. However, Plaintiff indicated that he did not want to do an interview. (Savage Decl., ¶ 31;
23 Pl.'s Depo. at 89:13–90:22.)

24 32. On May 10, 2017, Plaintiff's inmate appeal was partially granted at the first level,
25 as Plaintiff had already received the prescription recommended by the dermatologist. (Savage
26 Decl., ¶ 32; Abernathy Decl., ¶ 11.)

27 33. On May 19, 2017, Plaintiff had another dermatology consultation with Dr. Hrabko.
28 During the appointment, Plaintiff indicated that the 2% ketoconazole shampoo that Dr. Hrabko

1 had prescribed helped but was no better than Head and Shoulders shampoo and the selenium
2 sulfide shampoo. The physical examination revealed that Plaintiff had red macules (flat and
3 discolored areas of the skin) and papules (raised spots on the skin) on his nose. Dr. Hrabko
4 prescribed 2% ketoconazole cream to be used b.i.d. (i.e. twice a day) for the face indefinitely for
5 one year. Dr. Hrabko noted that the lichen planus, which was probably secondary to either the
6 hydrochlorothiazide or metformin, had not cleared. (Ex. Y, Dermatology Report; Savage Decl., ¶
7 33.)

8 34. On July 10, 2017, Plaintiff was scheduled for an appointment with a primary care
9 physician. However, Plaintiff refused to be seen, stating that he was stable and did not need
10 anything. (Ex. Z, Progress Note; Savage Decl., ¶ 34.)

11 Other Undisputed Facts

12 35. Defendant never intended that Plaintiff suffer any undue or unnecessary pain with
13 respect to his skin conditions, or for any other reason. (Savage Decl., ¶ 35.)

14 36. Defendant's intentions throughout were to ensure that Plaintiff promptly received
15 treatment that was medically necessary and appropriate for his condition at the time of treatment.
16 (*Id.*)

17 **C. Parties' Positions**

18 Defendant Savage contends that even when viewed in the light most favorable to Plaintiff,
19 the evidence in this case demonstrates that Defendant did not violate Plaintiff's constitutional
20 rights under the Eighth Amendment. Defendant was not involved in prescribing metformin to
21 Plaintiff, but even if he had been, such a prescription was medically appropriate because the
22 medication was necessary to treat Plaintiff's diabetes. Plaintiff was the one who had requested
23 the medication after he was unsuccessful with dieting and losing weight. Defendant was also not
24 involved in prescribing hydrochlorothiazide to Plaintiff when he arrived at SCC, and while
25 Defendant subsequently renewed the prescription, this was medically appropriate because
26 Plaintiff was diabetic and obese, and it was important that his blood pressure was controlled.
27 Plaintiff was not experiencing any adverse side effects from this medication at the time of the
28 renewal. Moreover, it was medically appropriate for Defendant to prescribe selenium sulfide and

1 clotrimazole to treat the seborrheic dermatitis on Plaintiff's face. Defendant is also entitled to
2 qualified immunity because he did not violate Plaintiff's constitutional rights nor would a
3 reasonable medical professional in Defendant's position have any reason to believe his actions
4 were unlawful. Further, Plaintiff failed to exhaust his administrative remedies prior to filing this
5 lawsuit against Defendant.

6 In opposition, Plaintiff argues that Defendant has failed to present evidence that he was
7 not deliberately indifferent to Plaintiff's serious medical need. Plaintiff stands by his allegations
8 in the complaint and throughout this case that Defendant failed to look up the most common
9 medications that can lead to lichen planus or refer to Plaintiff's drug chart, and refused to listen to
10 Plaintiff's repeated requests to be referred to a skin specialist. All of this demonstrates his
11 deliberate indifference. Plaintiff further argues that Defendant should have raised the issues of
12 qualified immunity and failure to exhaust at the earliest possible opportunity, rather than this late
13 in the lawsuit, and that both qualified immunity and failure to exhaust are not appropriate grounds
14 for summary judgment in this action.

15 In reply, Defendant argues that Plaintiff cannot create a genuine issue of material fact
16 simply by making assertions in his opposition and citing to various deliberate indifference cases
17 in support. Plaintiff has not submitted a signed declaration, a deposition transcript, or any
18 verified responses to interrogatories disputing the evidence submitted in support of Defendant's
19 motion for summary judgment, nor does he cite to any piece of evidence in the record
20 demonstrating that Defendant was deliberately indifferent to Plaintiff's medical needs. Apart
21 from general deliberate indifference case law, Plaintiff has not pointed to any specific cases
22 where a doctor was found liable in a similar situation as the one alleged in this lawsuit, and
23 Defendant is entitled to qualified immunity. Finally, the evidence clearly demonstrates that
24 Plaintiff failed to exhaust his administrative remedies against Defendant, and the Court's prior
25 ruling on the motion to dismiss filed by Defendant Ridge and former Defendant Miranda did not
26 consider whether Plaintiff exhausted his administrative remedies against Defendant Savage.

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1 **D. Analysis**

2 1. Defendant Waived the Affirmative Defense of Failure to Exhaust

3 While Defendant asserted the affirmative defense of failure to exhaust remedies in his
4 answer, (ECF No. 28, p. 6), Defendant did not file a motion for summary judgment raising the
5 issue by the December 2, 2021 deadline set by the Court’s discovery and scheduling order, (ECF
6 No. 68). *See Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (the affirmative defense of
7 non-exhaustion must be raised and proven in a motion for summary judgment). Defendant did
8 not seek an extension of that deadline and has not provided an explanation for his failure to do so.
9 Rather, Defendant included the non-exhaustion defense together with the instant motion for
10 summary judgment on the merits, despite the Court’s discovery and scheduling order specifying a
11 “deadline for filing all dispositive motions (other than a motion for summary judgment for failure
12 to exhaust).” (ECF No. 68, p. 3.)

13 Accordingly, the Court finds no evidence in the record that Defendant attempted to
14 resolve this issue “as early as feasible,” *see Albino*, 747 F.3d at 1168, and concludes that
15 Defendant waived the affirmative defense of failure to exhaust. *See Lira v. Herrera*, 427 F.3d
16 1164, 1171 (9th Cir. 2005) (failure to exhaust administrative remedies is an affirmative defense
17 that can be waived). The Court therefore does not address Defendant’s arguments with respect to
18 failure to exhaust.

19 2. Defendant Was Not Deliberately Indifferent to Plaintiff’s Medical Needs

20 Based on the evidence in the record, Plaintiff has failed to show that Defendant was
21 deliberately indifferent to Plaintiff’s medical needs. The undisputed facts show that Defendant
22 treated Plaintiff from approximately March 2014 to May 2015. UMF 8–19. During that time,
23 Defendant prescribed selenium sulfide lotion and clotrimazole cream to treat Plaintiff’s
24 seborrheic dermatitis. UMF 8. While Defendant renewed Plaintiff’s prescription for
25 hydrochlorothiazide to treat Plaintiff’s blood pressure, there was no indication that Plaintiff was
26 experiencing any adverse side effects (such as a skin condition) from this medication. UMF 11.
27 Plaintiff did not complain of other skin conditions during any other visits with Defendant during
28 this time. UMF 12, 17, 18. Plaintiff also requested more metformin when his insulin was

1 discontinued. UMF 18.

2 Plaintiff argues throughout his opposition that he repeatedly asked Defendant to refer
3 Plaintiff to a skin specialist after suffering for years, both before and while in the care of
4 Defendant, with skin conditions that caused severe pain and suffering. Plaintiff further contends
5 that Defendant then failed to provide proper medical care to Plaintiff, because he denied
6 Plaintiff's requests for a referral and continued to prescribe and re-prescribe metformin and
7 hydrochlorothiazide, the "most common offender medications" that had initially caused the lichen
8 planus.⁵ (ECF No. 82, p. 4.) However, Plaintiff provides no evidence, either in the form of
9 evidence from his medical records or a declaration signed under penalty of perjury, to support his
10 allegations that Plaintiff suffered from a severe skin condition while he was under the care of
11 Defendant, that Defendant was aware of the severe skin condition, and that Defendant refused to
12 provide proper medical care. This is not sufficient to create a genuine dispute of material fact.

13 *See Rivera v. AMTRAK*, 331 F.3d 1074, 1078 (9th Cir. 2003) ("Conclusory allegations
14 unsupported by factual data cannot defeat summary judgment.").

15 3. Qualified Immunity

16 Defendant also asserts that the Court should grant summary judgment on the basis of
17 qualified immunity. However, the Court finds that this argument need not be reached, based
18 upon the above determination regarding the undisputed facts in this case.

19 **IV. Conclusion and Recommendation**

20 For the reasons explained above, the Court finds that Defendant Savage is entitled to
21 summary judgment on Plaintiff's claims that Defendant Savage was deliberately indifferent to
22 Plaintiff's serious medical needs by continuing to prescribe medications that caused him to suffer
23 lichen planus, and then failed to treat such skin condition.

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26 ⁵ Even assuming that Plaintiff had presented evidence to support his contentions, Plaintiff has not shown that he
27 qualifies as an expert witness in order to be able to opine on the appropriateness of the medical care he received. *See*
28 Fed. R. Evid. 702. As he is a lay witness, the only admissible evidence Plaintiff can provide on his own is limited to
opinions that are rationally based on his perception; that are helpful to clearly understanding his testimony or to
determining a fact in issue; and are not based on scientific, technical, or other specialized knowledge within the scope
of Rule 702 such as medical opinions. *See* Fed. R. Evid. 701.

Accordingly, IT IS HEREBY RECOMMENDED that Defendant Savage's motion for summary judgment, (ECF No. 75), be GRANTED.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen (14) days** after being served with these Findings and Recommendations, the parties may file written objections with the court. The document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised that failure to file objections within the specified time may result in the waiver of the “right to challenge the magistrate’s factual findings” on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838–39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **March 18, 2024**

/s/ *Barbara A. McAuliffe*
UNITED STATES MAGISTRATE JUDGE